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In the Supreme Court of the United States

OCTOBER TERM, 1981

CALIFORNIA, ET AL., APPELLANTS

v.

GRACE BRETHREN CHURCH, ET AL.

UNITED STATES, ET AL., APPELLANTS

v.

GRACE BRETHREN CHURCH, ET AL.

GRACE BRETHREN CHURCH, ET AL., CROSS-APPELLANTS

v.

UNITED STATES, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether this Court has jurisdiction over this appeal.

2. Whether the Tax Injunction Act deprived the district court of jurisdiction over this action.

3. Whether the requirement of the Federal Unemployment Tax Act (26 U.S.C. 3309(b)(1)) that participating state unemployment compensation programs cover employees of elementary and secondary schools that have a religious orientation, but are not controlled by a church or convention or association of churches, is constitutional.

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OPINIONS BELOW

The opinion of the district court holding the Federal Unemployment Tax Act unconstitutional (J.S.

App. 38a-86a) is unreported.[1] The original (J.S. App. 1a-22a) and supplemental (J.S. App. 25a-34a) opinions of the district court at the preliminary injunction stage are likewise unreported.

JURISDICTION

The judgment of the district court was entered on April 6, 1981 (J.S. App. 87a-90a). The federal parties filed a notice of appeal to this Court on April 29, 1981 (J.S. App. 91a-92a). On June 19, 1981, Justice Rehnquist extended the time in which to docket an appeal to and including August 3, 1981 (J.S. App. 93a), and the appeal was docketed on that date. On November 2, 1981, the Court postponed further consideration of its jurisdiction to the hearing of the case on the merits. The jurisdiction of this Court rests on 28 U.S.C. 1252. See pages 13-15, *infra*.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *.

26 U.S.C. 3309(b) provides in pertinent part:

> This section shall not apply to service performed—
>
> (1) in the employ of (A) a church or convention or association of churches, or (B)

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[1] Unless otherwise indicated, references to the "J.S." and "J.S. App." are to the government's jurisdictional statement and appendix filed in No. 81-228.

> an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches;

28 U.S.C. 1252 provides in pertinent part:

> Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States, * * * holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party.

28 U.S.C. 1341 provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

Cal. Unemp. Ins. Code § 634.5 (West Supp. 1980) provides in pertinent part:

> With respect to * * * any nonprofit organization described by Section 608, "employment" does not include * * * service performed in any of the following:
>
> (a) In the employ of (1) a church or convention or association of churches or (2) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches.

STATEMENT

1. The Federal Unemployment Tax Act (FUTA), originally enacted as Title IX of the Social Security

Act of 1935, ch. 531, 49 Stat. 639 *et seq.*, authorizes a cooperative federal-state program to provide benefits to unemployed workers. In general, FUTA imposes an excise tax on wages paid by employers in covered employment, but allows the employer a credit of up to 90% of the federal tax for contributions paid to a state fund established under a federally approved state unemployment compensation law. 26 U.S.C. (& Supp. III) 3301, 3302, 3306; *St. Martin Evangelical Lutheran Church* v. *South Dakota*, No. 80-120 (May 26, 1981), slip op. 2 n.3. The Secretary of Labor annually reviews each state plan, and certifies those plans that comply with the standards established by 26 U.S.C. (& Supp. III) 3304 and 3309.[2]

These standards include minimum coverage requirements. Until 1970, FUTA broadly excluded from the definition of covered employment "service performed in the employ of a religious, charitable, educational, or other [income tax exempt] organization." Pub. L. No. 86-778, Section 533, 74 Stat. 984. In 1970, the required scope of qualifying state plans was expanded, to cover employees of nonprofit organizations, state hospitals, and institutions of higher education. Employment Security Amendments of 1970, Pub. L. No. 91-373, Section 104(b)(1), 84 Stat. 697, 26 U.S.C. (1970 ed.) 3309(a). The religious and educational exemption was narrowed to exclude only service performed (26 U.S.C. (1970 ed.) 3309(b)):

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[2] The certification of compliance with the federal standards means not only that employers in the state are entitled to the tax credit, but also that the state is authorized to receive a grant of federal funds for the administration of the state program (29 U.S.C. 49d; 42 U.S.C. 501).

> (1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches;
>
> (2) by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order;
>
> (3) in the employ of a school which is not an institution of higher education * * *.

In 1976, Congress again amended FUTA, eliminating subsection (3) above. Unemployment Compensation Amendments of 1976, Pub. L. No. 94-566, Section 115, 90 Stat. 2670. In order to maintain their compliance with FUTA, the states promptly enacted conforming amendments to their unemployment acts. See, *e.g.*, *St. Martin Evangelical Lutheran Church* v. *South Dakota*, *supra*, slip op. 5 n.8; J.S. App. 3a. The parallel California statutory provision is Cal. Unemp. Ins. Code § 634.5 (West. Supp. 1980).

Neither the 1970 nor the 1976 FUTA Amendments imposed the federal excise tax on nonprofit organizations, since service performed for such organizations remains exempt from the definition of "employment" for FUTA tax purposes (26 U.S.C. (& 1970 ed.) 3306(c)(8)). Qualifying state plans, however, must not only cover employees of such organizations, but also must give the organizations the option of either making regular payments to the state unemployment fund or reimbursing the fund for benefits paid out to the organization's employees (26 U.S.C. 3304(a)(6)(B), 3309(a)(2)).[3]

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[3] The conforming California statutory provisions are Cal. Unemp. Ins. Code § 801 *et seq.*, § 901 *et seq.*, § 976 *et seq.* (West 1972 & Supp. 1980).

The Secretary of Labor had interpreted the 1976 Amendments to require state unemployment insurance coverage of employees of church run and church related schools. Under the Secretary's interpretation, the only services exempt from coverage under the amended 26 U.S.C. 3309(b) were " 'those strictly church duties performed by church employees pursuant to their religious responsibilities within the schools.' " *St. Martin Evangelical Lutheran Church* v. *South Dakota*, *supra*, slip op. 5.

2. This litigation was initiated by a number of California churches and religiously oriented schools to enjoin the federal defendants from conditioning federal approval of the state plan on their coverage, and to enjoin the state defendants from collecting information from them on which to base coverage of their employees and from collecting the state tax (J.A. 12, 23-26).[4] Plaintiffs contended that all the private schools they represented were exempt from coverage under the terms of Section 3309(b) of FUTA and its "mirror image" (J.S. App. 56a), Cal. Unemp. Ins. Code § 634.5(a) (West Supp. 1980). Alterna-

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[4] Two separate suits were filed: one by Grace Brethren Church, et al. (case No. CV 79-93 MRP) and the other by The Lutheran Church Missouri Synod (case No. CV 79-162 MRP). The cases were consolidated in the district court.

The district court recognized (J.S. App. 25a-29a) that the plaintiffs represented schools of three distinct kinds: private schools that are part of the corporate structure of a church (Category I schools), private schools that are separate corporations formed by a church or convention or association of churches (Category II schools) and religiously oriented schools not affiliated with any particular church or convention or association of churches (Category III schools). For ease of reference, we will use these categories throughout this brief.

tively, they argued that if the statutes did cover them, they violated the religion clauses of the First Amendment and the equal protection component of the Fifth Amendment (and the Fourteenth Amendment making those clauses applicable to the states).

The district court rejected the federal government's argument that the Tax Injunction Act, 28 U.S.C. 1341, barred the court from granting the relief requested (J.S. App. 16a-21a). On the merits, it concluded that Category I and Category II schools (see note 4, *supra*) were exempt from coverage under the terms of FUTA and Cal. Unemp. Ins. Code § 634.5(a) (West Supp. 1980) (J.S. App. 9a-10a, 41a), and that although Category III schools were not exempt under the statutory language (J.S. App. 41a-54a), benefit entitlement decisions for employees of such schools posed such a risk of excessive governmental entanglement with religion that coverage of such schools violated the Establishment Clause of the First Amendment (J.S. App. 66a-76a).[5] The district court accordingly permanently enjoined the federal defendants from requiring that state unemployment compensation plans cover Category I and II schools as a condition of federal certification, and the state defendants from "collecting, or attempting to collect, unemployment compensation or disability taxes" from Category I, II, or III schools (J.S. App. 89a-90a).[6]

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[5] The district court rejected the alternative constitutional argument that the coverage of Category III schools violates the Free Exercise Clause of the First Amendment (J.S. App. 56a-66a), and found it unnecessary to reach the Equal Protection Clause claim (J.S. App. 76a).

[6] The district court explained (J.S. App. 86a n.39) that it was not entering an injunction against the federal defendants with regard to Category III schools because it had "no infor-

3. Shortly after this injunction was entered this Court announced its decision in *St. Martin Evangelical Lutheran Church* v. *South Dakota*, *supra*, holding that schools that have no legal identity separate from a church (Category I schools) are exempt from the federal-state unemployment compensation system under 26 U.S.C. 3309(b)(1)(A). Although there were no Category II or III schools before the Court in *St. Martin Evangelical Lutheran Church*, the Court noted (slip op. 10 n.12) that:

> To establish exemption from FUTA, a separately incorporated church school (or other organization) must satisfy the requirements of § 3309 (b)(1)(B): (1) that the organization "is operated, supervised, controlled, or principally supported by a church or convention or association of churches."

In light of this Court's decision in *St. Martin Evangelical Lutheran Church* v. *South Dakota*, *supra*, the district court's conclusion that FUTA does not require coverage of Category I schools is clearly correct. After careful consideration of the relevant legislation, the Secretary of Labor concluded that Congress intended to treat Category I and Category II schools alike, so we have not challenged in this Court the conclusion that Category II schools are also exempt under the statutory scheme. For that reason,

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mation indicating what response, if any, the Secretary will make" to the court's finding concerning them. The court warned, however, that "[i]f the Secretary, in response to failure by the state defendants to collect unemployment compensation taxes on behalf of Category III employees, institutes decertification proceedings against the State of California, the parties may apply to this Court for further relief" (*ibid.*).

the federal appellants did not appeal from the decision in the *Lutheran Church* case, which involves only Category I and Category II schools (see note 4, *supra;* J.S. 6 n.5).

The federal appeal thus relates only to the status of the four independent fundamentalist schools incorporated as the Redwood Christian Schools and the eight such schools incorporated as the Christian Unified Schools of San Diego, who are parties in the *Grace Brethren* case (J.S. App. 28a-29a, 40a n.4).[7] As the district court explained (J.S. App. 49a n.17):

> The independent fundamentalist schools are * * * nondenominational. Though the schools were formed and are operated predominantly for evangelical purposes, and though chapel services are conducted in the schools, the teachers and administrators of the schools are neither ordained ministers nor committed to any particular Christian denomination as a matter of school policy. Indeed, at trial, an administrator of plaintiff Redwood Christian Schools testified that formal denominational affiliation was avoided in order to broaden the appeal of the schools to parents and students of different denominations.

SUMMARY OF ARGUMENT

This Court has jurisdiction of this appeal under 28 U.S. 1252. The district court's injunction against the enforcement of the provisions of the California Unemployment Code is based on its conclusion that

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[7] In their motion to affirm in No. 81-31 (at 4), appellees state that the Christian Unified Schools of San Diego are Category II schools. Cf. 81-228 Motion to Affirm 5, 12. This Court need not resolve this essentially factual issue; it is undisputed that the Redwood Christian Schools are Category III schools.

the identical federal provision is unconstitutional, and its opinion leaves no doubt that, if the federal parties attempt to enforce the federal statute, they will also be enjoined. Section 1252 permits a direct appeal to this Court "however the question of constitutionality may arise, provided the United States is or has become a party and the decision is against the validity of the Act" (*International Ladies' Garment Workers' Union* v. *Donnelly Garment Co.*, 304 U.S. 243, 249 (1938)). This is such a case.

The district court should have dismissed the complaint pursuant to the Tax Injunction Act, 28 U.S.C. 1341, which prohibits a district court from restraining the assessment or collection of a state tax where there is a "plain, speedy and efficient remedy" in the state courts. Appellees' assertion that their state remedies are not "plain, speedy and efficient" because their objections are to the procedures by which the tax is assessed, not simply to the payment of the tax, ignores the teaching of this Court in *Rosewell* v. *LaSalle National Bank*, 450 U.S. 503 (1981), that the exception to the Tax Injunction Act does not apply when the state remedies permit a full hearing in which appellees may raise all their constitutional objections to the Act and obtain a judicial determination of its validity. In any event, appellees' argument is based on "a general distrust of the capacity of the state courts to render correct decisions on constitutional issues" (*Allen* v. *McCurry*, 449 U.S. 90, 105 (1980)), a distrust repeatedly condemned by this Court.

Because the district court failed to comply with the Tax Injunction Act, its decision has cast a cloud on the implementation not only of the California Unemployment Insurance Act, but also the unemploy-

ment insurance acts of many other states with similar provisions, and has threatened the efficient administration of the federal-state unemployment insurance system. Accordingly, we submit that it is appropriate for this Court to reject the district court's constitutional conclusions on the merits, thus removing that cloud.

Because FUTA does not aid religion and is not a step toward the establishment of religion, it does not violate the Establishment Clause of the First Amendment. Moreover, FUTA does not foster excessive governmental entanglement with religion. The only duty imposed on Category III schools under FUTA is to keep certain employment records, which are considerably less extensive than other recordkeeping requirements that this Court has held not to constitute excessive entanglement.

Appellees' assertion that FUTA creates unconstitutional entanglement is based upon certain alleged consequences of FUTA coverage that, in fact, would not occur. Because all Category III school employees are covered by FUTA, no inquiry need be made into the religious nature of an employee's service. By the same token, a hearing on an employee's eligibility for benefits would not result in entanglement, even if the employee had been dismissed on the ground of teaching false doctrine. An eligibility hearing would determine only whether an employee is entitled to benefits; no determination of church doctrine would be made. Indeed, although some inquiry into religious matters for the purposes of resolving secular issues does not violate the First Amendment (see *Committee for Public Education and Religious Liberty* v. *Regan*, 444 U.S. 646 (1980)), even an inquiry into church doctrine would almost never be necessary. A

Category III school is free to establish work rules of its choice and an employee may be discharged for violating them; the question whether those work rules or their application correctly reflect church doctrine is irrelevant to the eligibility hearing. Accordingly, FUTA creates only a very minimal degree of church-state involvement, which does not approach the level of an Establishment Clause violation.

Because the minimal entanglement involved here in no way hinders appellees' exercise of their religion, it does not violate the Free Exercise Clause. Although FUTA imposes no tax liability on Category III schools, it does create the possibility of a limited financial obligation of a school if one of its employees collects unemployment benefits. It is well settled, however, that a statute does not violate the Free Exercise Clause merely because it imposes a nondiscriminatory expense on the practice of religion. The important governmental interest in providing unemployment protection that is advanced by FUTA justifies the minimal entanglement and limited financial obligations that may result from its extension to Category III schools. The application of FUTA in a religiously neutral fashion to employees of Category III schools does not violate the First Amendment.

Finally, the application of FUTA to Category III schools, but not to Category I or II schools, establishes no arbitrary or capricious classification violative of the Fifth or Fourteenth Amendments. Instead, it is rational for coverage determinations to turn on the objective, easily provable question whether a school is controlled by a particular religious denomination, rather than requiring the state to make constitutionally sensitive determinations concerning whether a school is sufficiently "religiously oriented" to be exempt

from coverage. Moreover, it is reasonable to conclude that employees of denominational schools are more likely than employees of non-denominational schools to have access to church programs to ease the economic hardships of unemployment, and to fear that coverage of schools affiliated with a particular denomination poses a greater risk of church-state entanglement than coverage of schools independent of any particular church organization.

ARGUMENT

I. THIS COURT HAS JURISDICTION OVER THIS APPEAL

Although appellees have not questioned this Court's jurisdiction over this direct appeal, the Court postponed consideration of this question to the hearing of the case on the merits. While we contend (pages 15-20, *infra*) that the Tax Injunction Act (28 U.S.C. 1341) deprived the district court of jurisdiction over this case, it is clear that this Court's jurisdiction under 28 U.S.C. 1252 "in no way depends on" the jurisdiction of the district court. *McLucas* v. *DeChamplain*, 421 U.S. 21, 31 (1975); accord, *Weinberger* v. *Salfi*, 422 U.S. 749, 763 n.8 (1975). Thus, in *United States* v. *American Friends Service Committee*, 419 U.S. 7 (1974), this Court had jurisdiction on direct appeal to conclude that a district court was without jurisdiction to enjoin the collection of a federal tax under the Anti-Injunction Act, 26 U.S.C. 7421, which parallels the Tax Injunction Act.

This Court's jurisdiction under 28 U.S.C. 1252 depends on four conditions: 1) the judgment must be rendered by, *inter alia*, a "court of the United States" (see 28 U.S.C. 451); 2) an Act of Congress must be held unconstitutional; 3) the judgment must be

rendered in a civil proceeding; and 4) the United States or an agency, officer or employee thereof must be a party. 12 *Moore's Federal Practice* ¶ 411.11 (2d ed. 1981). The only condition about which there can be any question in this case is the second. But although the district court's judgment concerning the Category III schools (J.S. App. 89a) in terms applies only to Cal. Unemp. Ins. Code § 634.5(a) (West Supp. 1980),[8] the decision makes clear the court's holding that the federal statute cannot constitutionally be implemented by the Secretary of Labor, and that any effort to do so will be met by an immediate injunction without further consideration of the merits (J.S. App. 86a n.39). As this Court noted in *McLucas* v. *DeChamplain*, *supra*, 421 U.S. at 31, the purpose of 28 U.S.C. 1252 is "to afford immediate review in this Court in civil actions to which the United States or its officers are parties and thus will be bound by a holding of unconstitutionality." This is such a case.

In any event, the terms of the federal and the state statutes are identical, and, indeed, the state statute simply reflects the federal requirements in order to avoid "decertification of its program and the substantial hardship to California employers and employees which would result from termination of its FUTA benefits" (J.S. App. 6a). The district court recognized the primacy of the federal statute by focusing in its opinion on that Act and the Secretary's interpretation of it (see, *e.g.*, J.S. App. 9a-14a, 38a-39a, 41a-54a). In light of this particular statutory scheme, the district court's conclusion that the federal statute was unconstitutional was at least one ground for its judgment, which is sufficient un-

[8] Cf. *Williams* v. *Zbaraz*, 448 U.S. 358, 366 (1980).

der *United States* v. *Rock Royal Co-operative, Inc.*, 307 U.S. 533, 541 (1939), to permit a direct appeal to this Court. See also *International Ladies' Garment Workers' Union* v. *Donnelly Garment Co.*, 304 U.S. 243, 249 (1938) (direct appeal lies "however the question of constitutionality may arise, provided the United States is or has become a party and the decision is against the validity of the Act"). Cf. *United States* v. *Raines*, 362 U.S. 17, 20 (1960).

II. THE TAX INJUNCTION ACT DEPRIVED THE DISTRICT COURT OF JURISDICTION OVER THIS CASE

The Tax Injunction Act, 28 U.S.C. 1341, provides that:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

As this Court has recently emphasized, this statute is "first and foremost a vehicle to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes." *Rosewell* v. *LaSalle National Bank*, 450 U.S. 503, 522 (1981). The district court here failed to give deference to this purpose.

A. The Tax Injunction Act Is Applicable To This Case

Because the definition of "employment" subject to federal taxation under FUTA expressly excludes (26 U.S.C. 3306(c)(8)) service performed in the employ of a religious, educational, or other organization exempt from federal income tax under 26 U.S.C. 501(c)(3), no federal tax is involved in this case.

FUTA does require that states choosing to participate in the federal-state unemployment insurance program provide coverage for the employees of non-church affiliated religiously oriented schools. But unlike most employers subject to the state program, these nonprofit schools are not required to make regular contributions to the unemployment compensation fund from which the state benefits are paid. Instead, these employers may elect the reimbursement method of meeting their statutory obligations. Under that method, the employer is only required to reimburse the fund for any amount paid to the employer's former employees as unemployment benefits (26 U.S.C. 3304(a)(6)(B); Cal. Unemp. Ins. Code § 801 *et seq.* (West 1972 & Supp. 1980)).

Appellees do not dispute that their obligation under the state law is a tax for purposes of the Tax Injunction Act (see, *e.g.*, 81-455 J.S. 9);[9] their primary objection to the imposition of the tax appears to be to the burdens imposed by its record keeping and reporting requirements (81-228 Motion to Affirm 7-9; 81-455 J.S. 15). In any event, the Tax Injunction Act is broadly designed to protect the state fisc (cf. *Perez* v. *Ledesma*, 401 U.S. 82, 127 (1971)

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[9] They do suggest (81-228 Motion to Affirm 5 n.2) that the government's appeal, "insofar as it pertains to" the Tax Injunction Act, is untimely because we failed to pursue that issue in our interlocutory appeal to the Ninth Circuit from the issuance of a preliminary injunction. But the fact that an appeal may be taken from the grant of an interlocutory order under 28 U.S.C. 1292(a)(1) certainly does not require that such an appeal be pursued to this Court; the appeal from the final judgment can raise any interlocutory rulings in the case. *United States* v. *Clark*, 445 U.S. 23, 26 n.2 (1980), and cases there cited.

(Brennan, J., concurring and dissenting)), and in barring interference with the collection of "any tax under State law" (28 U.S.C. 1341) it includes within that phrase "any extraction of property from a private person by a sovereign for its use." *Tramel* v. *Schrader*, 505 F.2d 1310, 1315 (5th Cir. 1975). Accord, *Robinson Protective Alarm Co.* v. *Philadelphia*, 581 F.2d 371 (3d Cir. 1978); *Alnoa G. Corp.* v. *Houston*, 563 F.2d 769 (5th Cir. 1977), cert. denied, 435 U.S. 970 (1978) (special assessments). Moreover, the ban extends not only to enjoining the actual assessment of the tax, but also to review of the related administrative procedures. *United States Steel Corp.* v. *Multistate Tax Commission*, 367 F. Supp. 107, 112 (S.D.N.Y. 1973) (conduct of audits of taxpayers); *Huber Pontiac, Inc.* v. *Whitler*, 585 F.2d 817, 819-820 (7th Cir. 1978) (methods of assessment and administrative procedures).

Finally, contrary to the suggestion of the district court (J.S. App. 20a-21a), the fact that the state tax statute was enacted in response to FUTA does not make the court's issuance of an injunction here consistent with the policies underlying the Tax Injunction Act. Those policies "relate not so much to considerations of federalism as to the peculiar needs of tax administration." *Perez* v. *Ledesma*, *supra*, 401 U.S. at 127 (Brennan, J., concurring and dissenting). Even when a state statute permits a state tax refund suit to be brought in a federal court, the Tax Injunction Act prohibits such suits. *United Gas Pipe Line Co.* v. *Whitman*, 595 F.2d 323, 330 (5th Cir. 1979). A fortiori, the fact that the state tax act reflects federal policies does not make the Tax Injunction Act inapplicable.

B. The Tax Injunction Act Exception Does Not Apply To This Case

The Tax Injunction Act does permit the federal courts to act when the state courts do not provide a "plain, speedy and efficient remedy." It is this exception that the district court primarily relied upon, and that appellees have urged in their Motion to Affirm (81-228 at 5-12). This Court in *Rosewell* v. *LaSalle National Bank, supra*, 450 U.S. at 522, concluded that "the 'plain, speedy and efficient remedy' exception to the Act's prohibition was only designed to require that the state remedy satisfy certain procedural criteria"—namely, "a 'full hearing and judicial determination' at which [appellees] may raise any and all constitutional objections to the tax." *Id.* at 514. Appellees here recognize that ample state procedures are available to them (81-228 Motion to Affirm 9).[10] Their complaint rather concerns the

[10] Before resorting to the courts, a California employer may administratively appeal any determination of employer liability. After an employer's administrative remedies are exhausted, it can file a state court action to recover contributions that were wrongfully collected. Cal. Unemp. Ins. Code § 1241 (West Supp. 1980). If an employer prevails in such an action it will be awarded interest on the money it was wrongfully required to pay to the state. Cal. Unemp. Ins. Code § 1242 (West Supp. 1980). If an employer is unsuccessful in its state court action, it may appeal through the California court system to the State Supreme Court. From there a litigant can, of course, seek final review in this Court. 28 U.S.C. 1257. The remedy available to appellees in California's courts is thus similar to that invoked in the state courts of South Dakota in the *St. Martin* case, *supra*.

This procedure for obtaining a refund of unemployment insurance taxes is analogous to other California tax refund procedures, which the Ninth Circuit has ruled to be "plain, speedy and efficient" for purposes of the Tax Injunction Act. *Mandel* v. *Hutchinson*, 494 F.2d 364, 367 (9th Cir. 1974); *Aronoff* v. *Francise Tax Board*, 348 F.2d 9, 10 (9th Cir. 1965);

"entanglement" resulting from compliance with those procedures.[11] This is scarcely a claim that the procedures are not "plain, speedy or efficient." Cf. *Rosewell* v. *LaSalle National Bank*, *supra*, 450 U.S. at 516-521 & n.20.

Instead, like the unsuccessful respondent in *Rosewell*, appellees argue that the state remedy is inadequate. They contend (81-228 Motion to Affirm 5-12) the remedies are inadequate because they require compliance with the assessment procedures as a prerequisite to the suit for a refund, and that very compliance is inconsistent with appellees' claimed constitutional rights. Even assuming that this remains a viable objection after *Rosewell*,[12] it is far from clear that it accurately reflects the state law. The

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Harsh California Corp. v. *County of San Bernardino*, 262 F.2d 626, 628, 630 (9th Cir. 1958).

[11] Appellees do suggest (81-228 Motion to Affirm 11-12) that appellees "pastors and parents" have no remedy under California law "since they do not actually pay the tax." "Pastors," of course, are exempt from coverage under the plain terms of the Acts. 26 U.S.C. 3309(b)(2), Cal. Unemp. Ins. Code § 634.5(b) (West Supp. 1980); their interest in the coverage of Category III schools—those not affiliated with any particular denomination—would probably be insufficient to give them standing to challenge the tax statute in any event. Similarly, given the particular state statutory scheme (pages 5, 16, *supra*), and the focus of appellees' objections on the record keeping and reporting requirements imposed on them, it is doubtful that the parents would have standing either.

[12] The Court in *Rosewell* noted that "[w]hen it passed the [Tax Injunction] Act, Congress knew that state tax systems commonly provided for payment of taxes under protest with subsequent refund as their exclusive remedy" (450 U.S. at 523), strongly suggesting that such systems provide an "adequate" remedy.

district court recognized that there is "some California authority for the proposition" that appellees could raise their constitutional claims in state suit to enjoin collection of the tax (J.S. App. 17a-18a n.12), but found the authority "neither compelling nor recent," and thus insufficient to "establish[]" the existence of an adequate state judicial remedy (*ibid.*). The district court cited no case indicating that the state courts would be insensitive to appellees' claims. And *Modern Barber Colleges, Inc.* v. *California Employment Stabilization Commission*, 31 Cal. 2d 720, 725-726, 192 P.2d 916, 919 (1948), which carefully analyzes the constitutional claim there at issue to determine whether it could be adequately protected by the refund procedure, or whether prior review was necessary despite the state anti-injunction statute, strongly suggests that the state courts would give careful consideration to appellees' claims.[13] Here, as in *Stone* v. *Powell*, 428 U.S. 465, 494 n.35 (1976), this Court should be "unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States." See also *Allen* v. *McCurry*, 449 U.S. 90, 104-105 (1980); O'Connor, *Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge*, 22 Wm. & Mary L. Rev. 801 (1981).

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[13] The decision in *Modern Barber Colleges, supra*, 31 Cal. 2d at 724, 192 P.2d at 918, also rejected the contention that assessments of contributions to the unemployment fund were "taxes" within the California Constitution's ban on tax-injunction suits. But see J.S. App. 17a.

C. This Court Should, Nevertheless, Decide This Case On Its Merits

In sum, appellees have made an insufficient showing that they have no "plain, speedy and efficient remedy" in the state courts; the district court should accordingly have dismissed the suit as required by the Tax Injunction Act.[14] Because it did not do so, but instead concluded that the identical provisions of the state and federal statutes were unconstitutional, it raised doubts about the continuing applicability of 26 U.S.C. 3309(b) that would not be resolved if this Court were to decide this appeal on purely jurisdictional grounds. In light of the public interest in, and the Secretary's need for, a definitive interpretation of 26 U.S.C. 3309(b), the Secretary urges this Court to conclude that special circumstances justify its consideration of the merits of the district court's issuance of the declaratory judgment against the federal defendants.

This Court has considered the merits in cases reaching this Court on direct appeal under 28 U.S.C.

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[14] The question whether the Tax Injunction Act deprives a federal district court of jurisdiction to entertain actions identical to the present one has been decided by seven federal courts. With the sole exception of the court below, these courts have unanimously concluded that the Tax Injunction Act is such a jurisdictional bar. *Stockton Metropolitan Ministry* v. *Glick*, Civ. No. S-80-807 MLS (E.D. Cal. Apr. 16, 1981); *Ascension Lutheran Church* v. *Employment Security Commission of North Carolina*, 501 F. Supp. 843 (W.D.N.C. 1980); *Independent Baptist Church of Red Bank* v. *State of Tennessee*, 468 F. Supp. 71 (E.D. Tenn. 1978); *St. John Lutheran Church, Inc.* v. *Giles*, Civ. No. 78-1516 (N.D. Ohio Jan. 18, 1979); *North Side Church of Christ* v. *State of Florida*, Civ. No. TCA 79-0705 (N.D. Fla. Jan. 2, 1980); *Harvest Baptist Temple, Inc.* v. *Commonwealth of Kentucky*, Civ. No. C-79-0620 L(B) (W.D. Ky. May 16, 1980).

1252 after noting that there was a substantial question whether the district court had jurisdiction of the appeal. See, *e.g.*, *McLucas* v. *DeChamplain*, *supra*, 421 U.S. at 32; *Weinberger* v. *Salfi*, 422 U.S. 749, 763 n.8 (1975). Cf. *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274, 279 (1977). In those cases, as here, there was no doubt that the issues before the district court and this Court were constitutionally within the judicial power: they involve a "case or controversy" within Article III.

As this Court emphasized in *McLucas*, *supra*, 421 U.S. at 31, the purpose of Section 1252 is "to afford immediate review in this Court in civil actions [in] which the United States * * * will be bound by a holding of unconstitutionality." It is entirely consistent with this purpose for this Court to consider the "whole case" and, by reaching the merits, to remove the cloud on the constitutionality of FUTA created by the district court's unwarranted assertion of jurisdiction.

Finally, it is also consistent with the purposes underlying the Tax Injunction Act for this Court to reach the merits in this case and dispose of appellees' objections to FUTA and the California statute. In the absence of such a definitive rejection of the district court's constitutional analysis, the opinion below, although deprived of its precedential value, will remain as a practical threat to the efficient enforcement of the state tax laws. Cf. *Perez* v. *Ledesma*, *supra*, 401 U.S. at 127 (Brennan, J., concurring and dissenting).

III. FUTA IS CONSTITUTIONAL AS HERE APPLIED

A. Application Of FUTA To Category III Schools Does Not Violate The Establishment Clause

The court below held that unemployment coverage of employees of Category III schools was mandated by FUTA,[15] but that such coverage would result in excessive church-state entanglement in violation of the Establishment Clause of the First Amendment, which states that "Congress shall make no law respecting an establishment of religion * * *." This Court has held that the Establishment Clause is violated by the enactment of a law that establishes a religion or takes a step that could lead to such an establishment (*Lemon* v. *Kurtzman*, 403 U.S. 602, 612 (1971); *Engel* v. *Vitale*, 370 U.S. 421, 430 (1962)).[16]

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[15] Plaintiffs below contended that Category III schools were "churches" within the meaning of 26 U.S.C. 3309(b)(1)(A) and Cal. Unemp. Ins. Code § 634.5(a)(1) (West Supp. 1980), and thus that their employees were statutorily exempt from unemployment coverage. The district court rejected that contention (J.S. App. 42a-43a), and appellees have urged only their constitutional claims in their Motions to Affirm and their Cross Appeal.

[16] This Court has stated that, although the Establishment Clause and the Free Exercise Clause of the First Amendment may at times overlap, "they forbid two quite different kinds of governmental encroachment upon religious freedom." *Engel* v. *Vitale*, *supra*, 370 U.S. at 430. Decisions of this Court that have applied the Establishment Clause in overturning legislation, or upholding legislation against an Establishment Clause objection, have involved laws that *aided* religion or religious organizations. See, *e.g.*, *Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. 756 (1973) (school aid); *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971) (school aid); *Walz* v. *Tax Commission*, 397 U.S. 664 (1970) (tax exemption); *Epperson* v. *Arkansas*, 393 U.S. 97 (1968) (anti-evolution law); *Abington School District* v. *Schempp*, 374 U.S. 203 (1963) (Bible reading in schools).

The Court has utilized a three-pronged test where a statute raises an Establishment Clause question. Thus, a statute "does not contravene the Establishment Clause if it has a secular legislative purpose, if its principal or primary effect neither advances nor inhibits religion, and if it does not foster an excessive government entanglement with religion." *Committee for Public Education and Religious Liberty* v. *Regan*, 444 U.S. 646, 653 (1980). The court below held that FUTA failed to satisfy the third requirement.[17]

This Court has frequently emphasized that some contacts between church and state are inevitable. As was stated in *Lemon* v. *Kurtzman*, *supra*, 403 U.S at 614 (citations omitted):

> Our prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable. * * * Judicial caveats against entanglement must recognize that the line of separation, far from being a "wall," is a blurred,

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Here, however, the entire thrust of appellees' argument below was that FUTA coverage of employees of religiously oriented schools hinders, rather than assists, the exercise of religion. Such a claim, in our view, raises exclusively, or at least predominantly, issues under the Free Exercise Clause, discussed at pages 31-36, *infra*. In any event even if the analysis traditionally applied in Establishment Clause cases is applied, FUTA passes muster.

[17] Appellees briefly suggest (81-455 J.S. 16) that the primary effect of FUTA is to inhibit religion, because it requires the payment of "funds earmarked for religious purposes." But it seems scarcely subject to debate that the primary purpose of FUTA is to protect employees against the ravages of unemployment, and its primary effect is to do so without advancing or inhibiting religion. Indeed, as we show (pages 32-33, *infra*), any financial burden imposed on the Category III schools is *de minimis*.

> indistinct, and variable barrier depending on all the circumstances of a particular relationship.

The dispositive question—whether those church-state contacts are excessive—is thus one of degree. See *Walz* v. *Tax Commission*, *supra*, 397 U.S. at 674. Here, the only church-state contacts necessarily resulting from coverage of Category III schools arise from the requirement that such schools register as employers with the California Employment Development Department ("EDD"), keep accurate employment records, make related reports to the EDD, and make certain employment information available to their employees. Cal. Unemp. Ins. Code § 1085 *et seq.* (West 1972 & Supp. 1980). The records and reports required of employers concern such innocuous matters as the hours worked by, and wages paid to, each employee; the date each employee was hired and separated from employment; and the total number of employees and wages paid in each calendar quarter. This type of routine recordkeeping does not significantly entangle church and state. Indeed, the recordkeeping involved here is more routine and less extensive than the recordkeeping involved in the reimbursement process in *Committee for Public Education and Religious Liberty* v. *Regan*, *supra*, which this Court held not to constitute excessive entanglement. 444 U.S. at 659-661.[18]

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[18] The New York law challenged in *Regan* reimbursed private schools (including parochial schools) performing certain secular testing and reporting functions. The State monitored this reimbursement scheme to insure that State funds were not being used for religious purposes. This State monitoring required the parochial schools to submit to the State Commissioner of Education an application for reimbursement and further required submission of additional reports and

The court below indeed recognized that coverage of Category III schools does not involve impermissible "entanglement of the 'monitoring variety" (J.S. App. 66a).[19] Instead of finding any constitutional fault with what is required by the unemployment insurance scheme actually established by the federal and state laws, the court focused solely on potential problems it discerned in the methods the state used in determining a former employee's eligibility for unemployment benefits. The court's speculations about how religious questions might arise in making benefit determinations, and how the parties might deal with them (J.S. App. 68a-71a) are an insufficient basis for striking down a federal statute. Cf. *Com-*

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documents as prescribed by the Commissioner. 444 U.S. at 659. The law additionally required that the Commissioner audit all vouchers and other documents submitted by the parochial schools in order to substantiate their claims. Furthermore, the challenged law mandated the State Department of Audit and Control to inspect, from time to time, the accounts of recipient schools in order to verify the costs allegedly due. 444 U.S. at 660.

[19] The minimal church-state contacts that are involved under the federal-state unemployment insurance scheme at issue here do not approach the potential entanglement identified by this Court in *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979). There, the possible imposition of mandatory collective bargaining concerning the teaching mission of parochial schools raised the possibility that the National Labor Relations Board would become involved in "nearly everything that goes on in the schools." *Id.* at 503. Here, by contrast, the state would be concerned only with unemployment payments to an individual after his employment relationship with the school had been terminated, which would have no impact on the exercise of the school administration's discretion in operating the school.

mittee for Public Education and Religious Liberty v. *Regan*, *supra*, 444 U.S. at 660-661.

In any event, the benefit-determination procedures are most unlikely to require the state to inquire into matters of religious doctrine or morality.[20] FUTA permits participating states to deny or reduce unemployment benefits to persons who were discharged for misconduct connected with their work. 26 U.S.C. 3304 (a)(10). Based on this provision, all 50 states, including California, deny or reduce benefits to any former employee who is dismissed for "misconduct connected with his most recent work." Cal. Unemp. Ins. Code § 1256 (West Supp. 1980). A former employer has a financial stake in such a determination because the fewer the benefits paid to former employees, the lower an employer's financial obligation to the state will be (see pages 5, 16, *supra*).

The district court held that the misconduct determination might raise Establishment Clause problems in the case of employees of religiously oriented schools, because those employees may be dismissed for religiously motivated reasons. The court stated that in determining whether such an employee was dismissed for misconduct, making him ineligible for benefits, the state will be required to second-guess the school's determination in matters of religious doctrine or morality. Such essentially religious determinations by the state, the court concluded, would violate the First Amendment.

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[20] Even if such an inquiry were occasionally necessary, this Court has often recognized that some limited inquiry into religious matters may be necessary and permissible in the course of resolving purely secular legal issues. See *Wisconsin* v. *Yoder*, 406 U.S. 205, 215-216 (1972); *United States* v. *Ballard*, 322 U.S. 78 (1944).

The district court's analysis misperceives the nature of the state's inquiry in an eligibility determination. The Category III Schools involved in this action serve persons who belong to a number of different Christian sects. While the religious beliefs of such persons no doubt differ on a number of issues, presumably on other issues they share certain religious beliefs. The state has no need to evaluate or apply these religious beliefs. The state's concern—in the case of a claimant who was discharged from his job—is a quite distinct question: whether the actions for which the claimant was discharged constituted "misconduct" under the legal standards of Cal. Unemp. Ins. Code § 1256 (West. Supp. 1980).

The answer to that question has nothing to do with determining what is "true" doctrine or what is "immoral" conduct. Rather, the answer has to do with work rules. Teaching "false" doctrine is not, of course, misconduct under Cal. Unemp. Ins. Code § 1256. However, failure to abide by an established work rule is misconduct. Religiously oriented schools have it in their power to establish whatever work rules their religion requires (*e.g.*, a requirement that school teachers teach doctrinal matters as instructed by the school principal; or a rule that school employees abstain from drinking alcoholic beverages). The challenged laws impose no restrictions whatsoever on the establishment of such religiously motivated work rules. Once those rules are agreed to by a school and its employees, a teacher discharged for violating such a rule will be guilty of misconduct under California law and therefore ineligible for benefits. However, this determination will not be because the state has decided what is "true" doctrine or what constitutes "moral" behavior; rather, it will be based

on the state's determination that the former employee violated an agreed-upon work rule.

In short, the federal and state unemployment compensation laws in no way limit an employer's ability to establish whatever work rules it wishes and to require adherence to them as a condition of employment. School authorities may interpret their religious doctrines in whatever manner they wish, and establish corresponding work rules requiring adherence to their interpretations.[21] Whether those interpretations accurately reflect that religious doctrine is quite beside the point. Deliberate refusal to abide by an established work rule would in any event constitute misconduct under Cal. Unemp. Ins. Code § 1256. Accordingly, there is no need for the state to evaluate or apply a school's interpretation of the religious beliefs it follows.[22]

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[21] Contrary to the assumption of the district court (J.S. App. 70a), these work rules need not themselves attempt any comprehensive definition of accepted doctrinal positions; they may simply require the teacher to conform to the principal's interpretations of doctrinal matters. In that situation, the only possible question is whether the employee had sufficient warning that his conduct was inconsistent with the principal's interpretation—a question that raises due process, not religious, issues.

[22] The court also seems to suggest (J.S. App. 70a) that a dismissal for lack of "religious fervor" might raise entanglement problems. But it is most unlikely that a school could credibly contend that the lack of religious fervor was sufficient of itself to establish misconduct. Instead, it would seem closely analogous to dismissals for incompetence by other employers, and would presumably entitle the employee to benefits without further inquiry. To the extent that this result might tend to discourage such dismissals, it raises issues under the Free Exercise Clause (pages 31-36, *infra*), not entanglement concerns.

The history of the federal-state program and the record in this case support our position that the district court's predictions of entanglement problems are inaccurate.[23] Coverage of religious organizations under the unemployment compensation system is not a new phenomenon. Colleges—including those with a religious orientation—have been covered since the Employment Security Amendments of 1970, Pub. L. No. 91-373, 84 Stat. 695. Similarly, employees of elementary and secondary schools—including those with a religious orientation—were previously covered by the unemployment compensation system, from 1974 to 1978, under Title II of the Emergency Jobs and Unemployment Assistance Act of 1974, Pub. L. No. 93-567, 88 Stat. 1850 *et seq.* In most states all such elementary and secondary school employees were covered under the Secretary of Labor's interpretation of the Unemployment Compensation Amendments of 1976, Pub. L. No. 94-566, 90 Stat. 2667 *et seq.*, from 1978 until this Court's recent rejection of that interpretation in *St. Martin Evangelical Lutheran Church* v. *South Dakota*, *supra*. Outside of the educational context, other religiously oriented organizations not directly controlled by a church or convention or association of churches have been covered since enactment of the Employment Security Amendments of 1970.

Notwithstanding this history of coverage, plaintiffs below presented no evidence that they or any other religiously oriented organization had ever been involved in a single actual claim for unemployment

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[23] They also refute appellees' equally speculative assertions (81-228 Motion to Affirm 16 n.8) about the effects of the exceptions to the "work rule" requirement in Cal. Admin. Code tit. 22, § 1256-36(b)(2) (1981).

benefits that required an inquiry into church doctrine. Indeed, two witnesses offered by appellants, who were highly experienced in the field of unemployment compensation hearings, testified that they had never conducted, attended, or read a transcript of a hearing where such religious issues had ever been raised (J.A. 111, 155). Thus, the decision below regarding entanglement is not based on the requirements of the law or the evidence in the record. It rests only on a misunderstanding of what a benefit eligibility determination requires and speculation as to what such a determination might entail. As this Court has said on numerous occasions, it will not accept Establishment Clause arguments based on hypothetical facts or presumptions of bad faith by government officials. *Wheeler* v. *Barrera*, 417 U.S. 402, 426-427 (1974); *Committee for Public Education and Religious Liberty* v. *Regan*, *supra*, 444 U.S. at 660-661.

B. Application Of FUTA To Category III Schools Does Not Violate The Free Exercise Clause

The Free Exercise Clause of the First Amendment bars Congress from making any law "prohibiting the free exercise" of religion. In order to show a violation of that clause, "it is necessary * * * for one to show the coercive effect of the enactment as it operates against him in the practice of his religion [because] a violation of the Free Exercise Clause is predicated on coercion." *Abington School District* v. *Schempp*, 374 U.S. 203, 223 (1963). In the case at hand, the unemployment insurance coverage of employees of religiously oriented non-church schools involves neither the taxing of the practice of religion, nor any other type of coercion.

FUTA and the complementary state law, the California Unemployment Insurance Code, are neutral, social welfare legislation. These laws form one part

of the federal-state unemployment compensation system that protects working persons, their families and their communities against the potentially disastrous effects of sudden unemployment. This unemployment compensation system—which expressly *excludes* ministers, members of religious orders, and employees of churches, associations of churches, or of church affiliated schools (26 U.S.C. 3309(b); Cal. Unempl. Ins. Code § 634.5 (West Supp. 1980); *St. Martin Evangelical Lutheran Church* v. *South Dakota*, *supra*)—has, at most, only an indirect and incidental effect on the exercise of religion.[24] Accordingly, appellees carry a heavy burden in challenging the application to them of FUTA and the corresponding provisions of the California Code. As four members of this Court have admonished:

> To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, *i.e.*, legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature.

Braunfeld v. *Brown*, 366 U.S. 599, 606 (1961) (plurality opinion). Appellees' objections do not withstand such critical scrutiny.

Coverage of Category III school employees under FUTA, and the California Unemployment Insurance Code, does not automatically result in the levy of a flat tax on those schools. Rather, a covered school would have to reimburse the California unemployment insurance fund only if one of its former em-

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[24] In light of these exclusions, appellees' claims that the statutory scheme impacts on "churches, pastors and religious schools" are inaccurate (81-228 Motion to Affirm 7, and *passim*; 80-455 Cross-J.S. *passim*).

ployees applies and qualifies for unemployment benefits. Unlike for-profit corporations, nonprofit schools are not required to make regular contributions or tax payments to the unemployment compensation fund. These schools, like other nonprofit organizations, may instead elect the reimbursement method to meet their obligations under the unemployment compensation laws. 26 U.S.C. 3304(a)(6)(B). An employer electing the reimbursement method is liable only for those statutorily limited amounts paid out to the employer's former employees in the form of benefits. Such benefits are not automatically paid to all individuals who become unemployed. Rather, because the filing of a claim and the meeting of eligibility requirements are conditions precedent to the receipt of benefits, a Category III school electing the reimbursement method will not be required to pay any amount into the state's unemployment fund unless the former employee seeks, and is found entitled to, benefits.[25]

Such a statutory scheme, wherein no liability may ever occur, will have little, if any, impact upon appellees' religious practices and therefore can hardly be characterized as coercive. Thus, there is ample support for the specific finding of the court below that "the record as a whole does not support the conclusion that the effect of the additional financial burden will be significantly harmful" (J.S. App. 59a).

Even if some Category III school employees can be expected to seek and obtain unemployment com-

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[25] If appellees' statement that as "a matter of religious principle * * * they accept no governmental assistance" (81-228 Motion to Affirm 13) accurately reflects the religious beliefs of church members who are Category III school employees, few claims for benefits can be anticipated. See also 81-455 Cross-J.S. 10.

pensation payments, so that the statutory scheme can be assumed to impose a financial burden on appellees' schools, this is insufficient to invalidate it under the Free Exercise Clause. In *Braunfeld* v. *Brown*, *supra*, 366 U.S. at 605, this Court refused to invalidate a law on First Amendment grounds merely because it imposed a financial burden based on religious beliefs. The law challenged there required the closing of certain types of businesses, including appellants' stores, on Sunday. Appellants were members of the Orthodox Jewish faith, which required them to close their businesses on Saturday. Prior to the Sunday Closing Law, they had compensated for this Saturday closing by doing a substantial amount of business on Sunday. Thus the required Sunday closing had a severe economic impact, impairing the ability of all the appellants to earn a livelihood and rendering one unable to continue in his business. Despite this severe financial hardship, the Court refused to invalidate the law simply because it operated "so as to make the practice of [appellants'] religious beliefs more expensive." *Ibid.* As the plurality opinion explained (*id.* at 606-607):

> [I]t cannot be expected, much less required, that legislators enact no law regulating conduct that may in some way result in an economic disadvantage to some religious sects and not to others because of the special practices of the various religions. We do not believe that such an effect is an absolute test for determining whether the legislation violates the freedom of religion protected by the First Amendment.

Compared to the severe financial burden imposed in *Braunfeld*, the financial obligation that may be

imposed here, if indeed there is any, is de minimis. Thus, cross-appellants' argument that the imposition of the FUTA tax unconstitutionally burdens their religious activities is without basis in either fact or law.[26]

Furthermore, the unemployment tax or reimbursement is not, as appellees claim, a tax on a religious ministry or religious acts. Rather, the tax is on the employment relationship between California employers and their employees—including those employers who operate religiously oriented schools not affiliated with any church. Thus, appellees can no more claim a First Amendment exemption from the unemployment tax than they could from the assessment of income or social security taxes based on such employment. As the court below correctly stated (J.S. App. 62a):

> To hold otherwise would be to adopt the view that any thing or activity remotely connected to the exercise of religion or to those who engage in it is constitutionally immunized from taxation. That no such view was intended by the United States Supreme Court in *Murdock* [v. *Pennsylvania*, 319 U.S. 105 (1943)] and *Follett* [v. *McCormick*, 321 U.S. 573 (1944)], *supra*, is demonstrated by dicta, in both cases, expressly approving the taxation of the income of ministers

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[26] Indeed, in the present context an equally plausible Free Exercise claim could be made if Congress had chosen the course appellees advocate, and had excluded the employees of fundamentalist schools "*because of their faith, or lack of it*, from receiving the benefits of public welfare legislation"—*i.e.*, protection under the unemployment insurance program. *Everson* v. *Board of Education*, 330 U.S. 1, 16 (1947) (emphasis in original). See also *Sherbert* v. *Verner*, 374 U.S. 398, 409 (1963).

> or of church property (*Murdock*, *supra*, 319 U.S. at 112; *Follett*, *supra*, 321 U.S. at 578).

Accord, *Parker* v. *Commissioner*, 365 F.2d 792, 795 (8th Cir. 1966), cert. denied, 385 U.S. 1026 (1967); *Basic Unit Ministry of Alma Karl Schurig* v. *United States*, 511 F. Supp. 166, 168-169 (D.D.C. 1981).

Even if there were any merit to cross-appellants' contention that FUTA has a coercive effect on the exercise of their religion, such an effect would be permissible in light of the important governmental interests served by FUTA. The district court, recalling the tragic economic history that led to the enactment of FUTA, concluded (J.S. App. 65a):

> [A]nyone having the slightest familiarity with the history of the Great Depression can have no doubt that the interest which the various unemployment compensation statutes have been designed to serve is a compelling one.

See also *California Department of Human Resources Development* v. *Java*, 402 U.S. 121, 131 (1971). Thus, assuming, arguendo, that FUTA has some coercive effect on the exercise of religion, it is still valid under the First Amendment because it is justified by "a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate * * *.'" *Sherbert* v. *Verner*, 374 U.S. 398, 403 (1963), quoting *NAACP* v. *Button*, 371 U.S. 415, 438 (1963). In sum, appellees' Free Exercise arguments were properly rejected by the district court.

C. Application Of FUTA To Category III Schools Does Not Deny Equal Protection Of The Laws

The district court noted, but found it unnecessary to consider, appellees' claim that treating Category III schools differently from church-affiliated schools

would constitute a denial of equal protection in violation of the Fifth Amendment (J.S. App. 74a-76a).

Equal protection analysis requires merely that there be some rational basis for the challenged legislative classification, except in those few cases where the classification impermissibly interferes with the exercise of a fundamental interest or affects with particularity a protected class. *Ohio Bureau of Employment Services* v. *Hodory*, 431 U.S. 471, 489 (1977). In the present case, the challenged laws make no distinctions between religions or religious beliefs. All religions are equally eligible to establish church affiliated schools to qualify for the exemption under 26 U.S.C. 3309(b)(1) and Cal. Unemp. Ins. Code § 634.5 (West Supp. 1980), and all other schools, including Category III schools, are subject to identical coverage regardless of their religious orientation or lack of it.[27] Thus, the challenged classification must simply meet the rational basis test. As this Court has stated that standard:

> This inquiry employs a relatively relaxed standard reflecting the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one. Perfection in making the necessary classifications is neither possible nor necessary. *Dandridge* v. *Williams*, [397 U.S. 471,] 485 [(1970)]. Such action by a legislature is presumed to be valid.

Massachusetts Board of Retirement v. *Murgia*, 427 U.S. 307, 314 (1976), quoted in *Ohio Bureau of Employment Services* v. *Hodory*, *supra*, 431 U.S. at 489. Appellees' equal protection claim is without

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[27] The challenged statutes obviously involve no suspect classifications; appellees represent no specially protected class.

merit, since there is a rational basis for distinguishing between Category I and Category II schools on the one hand, and Category III schools on the other.[28]

It is not unreasonable to conclude that non-church schools, even these with a strong religious orientation, should be treated like secular schools rather than like the church-controlled schools that are entitled to the statutory exemption. The decision to treat these schools differently from church-run schools is justified on several grounds: First, church-run schools are more likely to have a strong and specific religious orientation than interdenominational schools or those established and run by the laity. Second, the risk of church-political entanglement is greater when church-controlled schools are involved. See *Lemon* v. *Kurtzman*, *supra*, 403 U.S. at 622-623; *Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. 756, 794-798 (1973).

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[28] Appellees' misapprehend Equal Protection analysis in asserting (81-228 Motion to Affirm 12-13) that their Category III schools are entitled to be treated like church schools because the district court found that the record here establishes that appellees' Category III schools are in fact "virtually identical" to church schools. As this Court has often emphasized, it is not a constitutional requirement that a challenged statutory classification "precisely filters out those, and only those, who are in the factual position which generated the congressional concern reflected in the statute", *Weinberger* v. *Salfi*, 422 U.S. 749, 777 (1975); *Mathews* v. *Lucas*, 427 U.S. 495, 516 (1976). The Due Process Clause of the Fifth Amendment prohibits only the use of classifications that are "patently arbitrary" and "utterly lacking in rational justification." *Weinberger* v. *Salfi*, *supra*, 422 U.S. at 768, quoting *Fleming* v. *Nestor*, 363 U.S. 603, 611 (1960). It is thus not enough to show that appellees' schools could reasonably be treated like Category I or II schools, or even that the reasons supporting the statutory classification do not in fact apply to their particular schools.

Third, there is a greater likelihood that employees of church-controlled schools will be provided with non-governmental assistance, through church relief programs, for economic hardship caused by unemployment. Finally, the distinction is practical to administer. It is relatively easy to determine whether a particular school is church controlled, but may be very difficult to determine whether it is sufficiently "religious" to qualify for exemption as a Category III school. Even aside from the difficulty of formulating standards in this area, application of those standards would involve a substantial risk of government intrusion into a constitutionally sensitive area. Congress should not be presumed to have intended such a constitutionally sensitive inquiry in the absence of an "affirmative intention of the Congress clearly expressed." *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 506 (1979).

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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